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In the Supreme Court of the United States

OCTOBER TERM, 1993

ARMADORES de CABOTAJE, S.A.
Petitioner

VERSUS

JERRY YOUNG
Respondent

PETITION FOR WRIT OF *CERTIORARI* TO THE LOUISIANA COURT OF APPEAL FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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36 pp

QUESTIONS PRESENTED

1. The Court should grant *certiorari* to resolve a split in the circuit courts of appeals as to whether a vessel owner's duty to make safe the portions of the ship and ship equipment that it turns over to discharging stevedore, (the "turnover duty" of *Scindia Steam Navigation Co. v. De los Santos*, 451 U.S. 156, 101 S.Ct. 1614 (1981)), extends to cargo loaded by an independent, foreign stevedore. The Fifth and Ninth Circuits, as well as the Louisiana Fourth Circuit, conclude the duty extends to the cargo. The Third Circuit concludes the duty extends only to the vessel and her equipment, not the cargo.

2. The Court should grant *certiorari* to resolve a split in the circuit courts of appeals concerning the duty a vessel owner owes longshoremen employed by a discharging stevedore for personal injuries arising out of the negligent stowage of the cargo by an independent, loading stevedore. The Fifth and Ninth Circuits, as well as the Louisiana Fourth Circuit, conclude a vessel owner is liable if it *knew or should have known* of the dangerous condition of the cargo and fails either to correct or warn of the condition, thereby implying a duty to supervise. The Third Circuit concludes a vessel owner is liable only if it has *actual knowledge* of the improper stowage and fails either to warn or to correct the condition, recognizing the vessel owner has no general duty to inspect cargo operations at the loading port.

LIST OF PARTIES

The following are the parties to this proceeding:

1. Jerry Young,
plaintiff-respondent;

2. Armadores de Cabotaje, S.A.,
defendant-petitioner[1],

3. Empresa Nacional Siderurgica, S.A.,
defendant;

4. Cooper T. Smith Stevedoring Co., Inc.,
intervenor.

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[1] Pursuant to Supreme Court Rule 29.1, Armadores de Cabotaje, S.A. states that it has no parent corporations or non-wholly owned subsidiaries.

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DECISIONS BELOW

The decision of the Louisiana Court of Appeal for the Fourth Circuit is reported at 617 So.2d 517 (La. App. 4th Cir. 1993), and is reproduced in Appendix A. (App. pp. 1a-62a.) On May 12, 1993, the Louisiana Fourth Circuit denied the application for rehearing filed by co-defendant, Empresa Nacional Siderurgica, S.A. (hereinafter "ENSIDESA"), which order is reproduced in Appendix B. (App. p. 63a.)

On October 1, 1993, the Supreme Court of Louisiana denied the applications for writs of *certiorari* filed by petitioner, Armadores de Cabotaje, S.A. (hereinafter "ARCASA"), ENSIDESA, and plaintiff, which are reported at 625 So.2d 170-71, and reproduced in Appendix C. (App. pp. 64a-66a.)

JURISDICTION

On March 31, 1993, the Louisiana Fourth Circuit entered judgment from which ARCASA seeks review. On May 12, 1993, the Louisiana Fourth Circuit denied ENSIDESA's application for rehearing.

ARCASA timely filed its application for writ of *certiorari* or review with the Supreme Court of Louisiana, which that Court denied on October 1, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 and Rule 13.4 of the Rules of the Supreme Court.

STATUTORY PROVISION INVOLVED

The following statute of the United States of America is in-

volved in this petiton:

33 U.S.C. § 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any arrangements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

On November 22, 1982, Jerry Young, a longshoreman for seventeen years, employed by Cooper T. Smith Stevedoring Co., Inc. (Cooper), allegedly was injured while unloading a cargo of steel I-beams from the M/V LORENA. The M/V LORENA, a Spanish flag cargo ship, was owned and operated by ARCASA, a Spanish corporation. ENSIDESA, shipper and owner of the cargo of steel I-beams, was the voyage charterer of the M/V LORENA.

ARCASA and ENSIDESA executed a voyage charter party for carriage of the cargo from Aviles, Spain to either New Orleans or Houston, at ENSIDESA's option. Under the terms of the charter party, ENSIDESA was required to load, stow, and discharge the cargo. ENSIDESA also was required to provide "all materials and/or wood for dunnage and any separations required."

ENSIDESA employees prepared a stowage plan for the cargo, which the master of the M/V LORENA approved. The plan merely identified the quantity and location of the cargo in the cargo holds of the vessel. It did not indicate the manner of stowage nor did it describe the dunnage to be used.

On October 17-22, 1982, ENSIDESA employees loaded the cargo aboard the vessel at Aviles, Spain. In accordance with Spanish custom, ENSIDESA stowed the I-beams in the "H" configuration, so if one were looking at the end of the beams down their lengths, the ends would resemble the letter "H." ENSIDESA placed wooden dunnage between layers or tiers of beams in the customary fashion. The cargo surveyor in Spain did not notice

anything unusual about the manner in which the dunnage was used for the cargo.

The M/V LORENA departed Spain and arrived in New Orleans in November 1982 to discharge a portion of the cargo. ENSIDESA hired Cooper to offload the cargo; discharge commenced on November 21, 1982.

Cooper supervisory personnel inspected the vessel and her cargo before beginning the discharge operations. They authorized the longshoremen to unload the cargo, as the longshoremen had the expertise to discharge the cargo safely, and the operation presented no unusual hazards.

The Cooper supervisors also monitored the discharge. They never stopped the unloading prior to the accident, although they had authority to do so (or would bring the matter to the attention of a superior) had they concluded that the operation was too hazardous. Indeed, they would not have let the longshoremen work the cargo if they thought the conditions were too hazardous.

The Cooper supervisors customarily recorded problems encountered during the stevedoring operation on Cooper's "vessel activity log" form. In this instance, the only report of any "hazards" concerned mud and clay on the wharf from previous operations concerning another vessel. Nothing on or about the wharf had anything to do with plaintiff's injury.

The longshoremen did not complain about the stow or report any difficulties in discharging the cargo. The longshoremen did not ever communicate with any vessel personnel.

No member of the vessel crew had anything to do with the discharge operation. There was no evidence that vessel personnel observed any part of either the loading or the discharge operation, much less that they were put on notice of any problems allegedly encountered by the longshoremen either in Spain or in New Orleans. The entire discharge was conducted by and was the responsibility of Cooper, which had been hired by ENSIDESA. Moreover, ENSIDESA conducted the entire loading in Spain.

Cooper discharged the cargo with its crane barge, the LISA C, located between the M/V LORENA and the wharf. The deeper the men got into the hold, the more crushed was the wooden dunnage. At some locations several bundles of I-beams were resting directly on the bundles below. At approximately 2:00 p.m. on November 22, 1982, during the second day of discharge, Young was working in one of the two holds of the M/V LORENA. Plaintiff claims he sustained injury when a breakout wire - used to lift the end of a bundle of beams - slipped off, striking him. After plaintiff's injury, the remainder of the cargo of beams were discharged in the same manner, without incident.

In October, 1984, Young filed suit against ARCASA for vessel negligence pursuant to the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 905(b). Cooper filed an intervention for medical and compensation payments. Young amended his petition to name Cooper, the owner of the LISA C, and ENSIDESA as defendants. The district court granted summary judgment in favor of Cooper and against Young concluding Cooper acted in the capacity of a stevedore, not a vessel owner, with respect to the LISA C.

On January 26, 1989, ARCASA filed a cross-claim against ENSIDESA for indemnity pursuant to the charter party. ENSIDESA later filed a cross-claim against ARCASA.

A jury trial was held on April 17, 1989. The district court severed the cross-claims of ARCASA and ENSIDESA. The jury returned a verdict, finding ENSIDESA 85% at fault and ARCASA 15% at fault in causing plaintiff's damages, and awarded plaintiff $1,700,000.00 in damages. (Jury Verdict, Appendix D, pp. 67a-71a.) The court entered a Partial and Final Judgment, filed of record, May 24, 1989. (Appendix E, pp. 72a-74a.)

ARCASA and ENSIDESA filed separate motions for judgment notwithstanding the verdict, or alternatively for new trial, which the district court denied in an Amended Final Judgment entered on September 1, 1989. The trial court also ruled that neither ARCASA nor ENSIDESA were entitled to indemnity or contribution from the other. (Appendix F, pp. 75a-77a.) Thereafter, ARCASA and ENSIDESA moved for reconsideration and to remit the damage award, which the district court denied, and entered final judgment on October 6, 1989. (Appendix G, pp. 78a-79a.)

On October 25, 1989, ARCASA filed an appeal with the Louisiana Fourth Circuit, claiming the district court erred in denying ARCASA's motion for judgment notwithstanding the verdict based on the absence of facts concerning ARCASA's breach of any duty to the Cooper longshoremen; in failing to strike the testimony of plaintiff's cargo surveyor, or "liability expert;" in prohibiting an expert in stevedoring operations to testify in rebuttal; in denying its motion for new trial based on the Court's erroneous jury instructions and the entry of a verdict con-

trary to the law and evidence; in failing to grant remittitur; and in denying ARCASA's cross-claim against ENSIDESA. ENSIDESA also filed an appeal.

The Louisiana Fourth Circuit reversed the district court's dismissal of ARCASA's cross-claim, and ordered ENSIDESA to provide indemnity to ARCASA for its portion of the judgment. 617 So.2d at 544, App. A, pp. 59a-61a. The appellate court also reduced the damage award from $1,700,000.00 to $1,106,046.00. 617 So.2d at 536-544, App. A, pp. 41a-59a. The court of appeal concluded ARCASA "knew or should have known that the method of stow" created a hazard to the discharging longshoremen and therefore it was liable to plaintiff. 617 So.2d at 528, App. A, p. 21a. The court opined that "a reasonable owner/operator...would have perceived the dangers presented by the [stow]." *Id.*

ENSIDESA petitioned for rehearing concerning the cross-claim and indemnity in favor of ARCASA. On May 12, 1993, the Louisiana Fourth Circuit denied rehearing. (App. B, p. 63a.)

ARCASA timely applied for a writ of *certiorari* or review with the Louisiana Supreme Court contending that "knew or should have known" was the improper standard; that ARCASA owed no duty to correct ENSIDESA's cargo stowage or to warn the Cooper longshoremen of that open and obvious condition; that no evidence established ARCASA breached its duty to plaintiff; and that the court of appeal should have reduced the damage award further. ENSIDESA and plaintiff also applied for writs of *certiorari* or review with the Louisiana Supreme Court. On October 1, 1993, the state supreme court denied the applications of all the parties. (App. C, pp. 64a-66a.)

REASONS FOR GRANTING THE WRIT

In 1972, the Congress amended the LHWCA, in part, to eliminate a vessel owner's absolute liability to a longshoreman for the breach of the warranty of seaworthiness, but retained the vessel owner's liability for negligence. Congress did not set forth the standard of care for vessels. Instead, the legislature delegated that task to the judiciary through the "application of accepted principles of tort law and the ordinary process of litigation." H.R. Rep. No. 1441, 92nd Cong., 2nd Sess., *reprinted in* 1972 U.S.C.C.A.N. 4698, 4704.

Nine years later, in *Scindia Steam Navigation Co. v. De los Santos*, 451 U.S. 156, 101 S.Ct. 1614 (1981), this Court granted *certiorari* to resolve the disagreement among the circuit courts concerning the applicable standard of care a vessel owed longshoremen under § 905(b). The Second, Fourth, and Fifth Circuits applied the land-based negligence standard set forth in the Restatement (Second) of Torts §§ 343 and 343A. *Id.* 451 at 163 n. 9, 101 S.Ct. at 1620 n. 9. The First, Third, and Ninth Circuits refused to follow the Restatement standard because that would bar recovery by a contributorily negligent longshoreman or a longshoreman injured by an open and obvious condition. *Id.*

The Court enunciated three duties of the vessel owner which depended on the phase of the cargo operations and the vessel owner's degree of involvement:

1. Before turning the vessel over to the stevedore "[t]he shipowner has a duty with respect to the condition of the ship's gear, equipment, tools and work space to be

used in the stevedoring operations; if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman." *Id.* at 167, 101 S.Ct. at 1622.

2. Once the stevedoring operations begin, "the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harms from hazards they may encounter in areas or from equipment under the active control of the vessel during the stevedoring operation." *Id.*, 101 S.Ct. at 1622.

3. Once the stevedoring operations have begun, if the stevedores "judgment [in continuing to use defective vessel equipment] was so obviously improvident that [the vessel owner], if it knew of the defect and that [the stevedore] was continuing to use it, should have realized that the [defective vessel equipment] presented an unreasonable risk of harm to the longshoreman, [such presents a question of fact as to whether the vessel owner has] a duty to intervene and repair the [defective vessel equipment]. *Id.* at 175-76, 101 S.Ct. at 1626.

The paragraph describing the third duty ends with the nebulous statement "[t]he same would be true if the defect existed from the outset and [the shipowner] must be deemed to have been aware of its condition." If "deemed" means the shipowner is deemed to have a knowledge even when in the exercise of due care it did not acquire actual knowledge of the defective condition, this is a return to the warranty of seaworthiness which the 1972 amendments

abrogated. If this sentence is interpreted, as it correctly should be interpreted, as merely a factual statement applicable to the *Scindia* case in the fact intensive paragraph from which the general duty is drawn, the reintroduction of liability without fault is avoided. In the instant case, although there was no evidence the vessel owner even performed an inspection of the cargo owned by another and loaded by another, the appellate court inferred knowledge and essentially re-established the warranty of seaworthiness.

Thus, the *Scindia* Court clarified the responsibilities of the parties involved in cargo operations in a single port.

Twelve years after *Scindia*, the circuit courts are in disagreement over what duty a vessel owner owes under LHWCA § 905(b) to longshoremen discharging cargo improperly stowed in a foreign port by an independent stevedore. The split concerns the application of the first *Scindia* duty, often referred to as the "turnover duty," in this context. The vessel owner has the duty:

> to exercis[e] ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warn [ ] the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of

> his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Scindia, 451 U.S. at 167, 101 S.Ct. at 1622.

Three Justices of the Court previously recognized the split between the Third and Fifth Circuits concerning that duty. *Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050, 110 S.Ct. 853 (1990) (White, J., joined by Rehnquist, C.J. and Kennedy, J., dissenting from denial of *certiorari*).

The Third Circuit concludes the turnover duty extends "to the ship's gear, equipment, tools and work space to be used in stevedoring operations," not the cargo. *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007, 108 S.Ct. 1733 (1988). Additionally, the Third Circuit concludes the vessel owner has no general duty to inspect or supervise cargo operations and thus should be liable, if at all, for negligently stowed cargo only upon attaining actual knowledge of the hazard. *Id.* at 496.

The Fifth Circuit, recently joined by the Ninth Circuit, reached the opposite conclusions on both points. See *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied sub nom., Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050, 110 S.Ct. 853 (1990); *Riggs v. Scindia Steam Navigation Co.*, ____ F.3d ____, 1993 WL 452738 (9th Cir. 1993). Those courts do not distinguish between a vessel's gear and equipment and cargo loaded aboard the vessel by a third-party concerning the turnover duty. *Woods*, 873 F.2d at 848-49; *Riggs*, at *3. Furthermore, the Fifth and Ninth Circuits conclude vessel owners are liable for

negligent stowage of cargo where the vessel owner knew or should have known of the dangerous condition. *Woods*, 873 F.2d at 851-52; *Riggs* at *3. In the instant case, the Louisiana Fourth Circuit followed the rationale of the U.S. Fifth Circuit in *Woods*, and found ARCASA liable because it knew or should have known the method of stow presented risks to the discharging longshoremen. ARCASA respectfully suggests the Court grant *certiorari* to resolve the split concerning the duty, *if any*, a vessel owes a longshoreman injured while unloading cargo defectively stowed by an independent stevedore.

I. ARCASA OWED NO DUTY WITH RESPECT TO THE CARGO.

As pertains to ARCASA, Cooper and Young, this matter involves only the first *Scindia* duty - the turnover duty. In setting forth the parameters of the turnover duty, this court referred to the "ship and its equipment." *Scindia*, 451 U.S. at 167, 101 S.Ct. at 1622. The Court did not mention or refer to the duty extending to the *cargo*.

This is no surprise. The shipowner's expertise lies in the navigation and care of the ship and its equipment. In contrast, as this Court and others consistently have recognized, it is the stevedore that is "expert and experienced" in handling cargo, not the shipowner. *Id.*, 101 S.Ct. at 1622; *Raymond v. I/S CARIBIA*, 626 F.2d 203, 206 (1st Cir. 1980), *cert. denied*, 451 U.S. 969, 101 S.Ct. 2045 (1981); *Robertson v. Tokai Shosen K.K.*, 655 F.Supp. 152, 154 (E.D. Pa. 1987).

The court of appeal concluded ARCASA knew or

should have known that ENSIDESA's stowage of the I-beams in the "H" configuration presented risks to the Cooper longshoremen. In so holding, the Louisiana Fourth Circuit followed U.S. Fifth Circuit precedent which erroneously extended a shipowner's responsibility to discharging longshoremen for cargo negligently loaded by foreign stevedores. 617 So.2d at 526-27, App. A, pp.16a-19a (citing *Woods, supra; Harris v. Flota Mercante Grancolumbiana, S.A.*, 730 F.2d 296 (5th Cir. 1984); and *Lemon v. Bank Lines Ltd.*, 656 F.2d 110 (5th Cir. 1981). The Louisiana Fourth Circuit, however, did not specifically address whether the turnover duty encompasses cargo of the vessel, although it improperly and implicitly transformed cargo into part of the ship and her equipment. The court's opinion thus is legally erroneous.

Derr is directly on point. As in the case at bar, a longshoreman was injured while offloading cargo from the vessel, alleging his injuries resulted from cargo negligently stowed by a foreign stevedore. The Third Circuit specifically recognized that the stevedore was in the best position to avoid accidents during cargo operations. *Derr*, 835 F.2d at 493. The court also observed:

> *Scindia* compels the holding that the shipowner has no duty to supervise or inspect cargo *loaded or unloaded* by stevedores and therefore may not be held liable for injuries arising out of the stevedore's failure to perform his job properly.

Id. (emphasis added)(footnote omitted). Derr contended the vessel was liable for breach of the turnover duty for the cargo, because the cargo was the "work space" of the vessel used by the stevedore. The Third Cricuit disagreed:

> We construe that language to refer to the physical work space. *The [Scindia] Court could not have intended by this reference to establish a duty by the ship with respect to cargo that it had expressly negated in other portions of the opinion.* Thus, there was no basis in either of these cases for the jury to have found negligence by the ships on basis of any defective equipment or gear.

Id. at 495-96 (emphasis added).

In addition to *Derr*, other circuits have recognized that the shipowner's duties with respect to the cargo are not the same as the duties with respect to the ship or its equipment. In *Melanson v. Caribou Reefers, Ltd.*, 667 F.2d 213 (1st Cir. 1981), the First Circuit stated:

> We do not find that *Scindia* changes the result in this case. *Scindia* involved a situation where equipment belonging to the ship which had been malfunctioning for two days injured a longshoreman. The court found that where the "judgment" of the stevedore in allowing the longshoremen to use the winch was "so obviously improvident" and the ship knew or should have known that the condition "presented an unreasonable risk of harm to the longshoremen...that in such circumstances it had a duty to intervene and repair..." 101 S.Ct. at 1626. *This case concerns the condition of the cargo and not the condition of the ship's gear.* Moreover, there is no evidence in the record to indicate that the stevedore here acted "improvidently" in allowing the longshoremen to unload the cartons after it was found that some of them were frozen together.

Id. at 214-15 (emphasis added). See also *Raymond, supra,* where the First Circuit concluded that it is the condition of the ship, not the cargo, for which the vessel may be held responsible. *Raymond,* 626 F.2d at 200.

The Fifth Circuit and courts within the Fifth Circuit also have noted that *Scindia* addressed the ship's equipment or gear, not other hazards that may occur aboard a ship. *Futo v. Lykes Bros. S.S. Co., Inc.,* 742 F.2d 209, 215 (5th Cir. 1984); *Hunter v. Navrom,* 690 F.Supp. 517, 519 (E.D. La. 1988), *aff'd* 868 F.2d 1386 (5th Cir. 1989)("An extremely important factor distinguishing *Scindia* from the case at hand is that in *Scindia* the dangerous condition of the stevedore operations resulted from a winch which was part of the ship's gear.")

In *Woods,* the Fifth Circuit considered whether the *Scindia* duties extended only to the vessel's gear and equipment, and not the cargo, as the *Derr* court concluded. However, the court concluded its decisions in *Lemon* and *Harris* required the rejection of *Derr's* reasoning. "Settled case law in this circuit forecloses the conclusion that a vessel does not...bear any responsibility for the vessel's cargo and its manner of stowage." *Woods,* 873 F.2d at 848-49. Although *Lemon* and *Harris* held a vessel owner liable for negligently stowed cargo, neither of those cases ever discussed the distinction between cargo and equipment for purposes of the *Scindia* turnover duty. Constrained by precedent, the *Woods* panel could not reconsider that rationale, but had to await *en banc* consideration, which subsequently was denied. 878 F.2d 1435 (5th Cir. 1989).

In *Riggs,* the Ninth Circuit also addressed whether

the turnover duty was limited to the vessel and her equipment, and not the cargo. The *Riggs* court relied on the precedent of *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294 (1982). *Turner*, however, did not address this Court's distinction between the vessel, her equipment and the cargo.

It is clear the circuit courts are split on whether the vessel owner's turnover duty extends to the cargo. ARCASA submits the Court should grant *certiorari* to clarify the duty, if any, concerning the cargo.

II. A SHIPOWNER SHOULD NOT BE LIABLE TO A DISCHARGING LONGSHOREMAN FOR INJURIES CAUSED BY NEGLIGENT STOWAGE OF CARGO BY AN INDEPENDENT STEVEDORE UNLESS THE SHIPOWNER HAS ACTUAL KNOWLEDGE OF THE NEGLIGENT STOWAGE.

As discussed above, the Court's choice of the terms "ship" and "equipment" for the objects of the turnover duty indicates that duty does not encompass cargo loaded by an independent stevedore. As the Third Circuit correctly noted in *Derr*, cargo does not comprise a part of the vessel's equipment or gear, the defects of which would require the owner to warn the stevedore or to correct the condition. Accordingly, ARCASA owed no duty to Young for the negligent stowage of the cargo.

However, should the Court conclude a vessel owner owes a duty to a discharging longshoreman, ARCASA submits that duty should not be any greater than the duty the

the vessel owner owes to a loading longshoreman injured during cargo operations at the loading port.

The Louisiana Fourth Circuit, in applying to wrong standard, concluded:

> [T]hat the vessel owner, ARCASA, *knew or should have known* that th[e] method of stow presented these risks to the longshoremen. That is "a reasonable owner/operator...would have perceived the dangers presented by the [stow]."

617 So.2d at 528, App. pp. 21a. (quoting *Woods, supra)* (emphasis added). This is the same standard of conduct set forth in the turnover duty. The duty a shipowner owes to longshoremen with respect to *cargo, if there is any such duty at all,* is not the same duty it owes to longshoremen with respect to the ship or its equipment. Moreover, it represents an application of the "general 'reasonableness' " standard against which the concurrance of Justice Powell, joined by Justice Rehnquist, warned. *Scindia,* 451 U.S. at 180-81, 101 S.Ct. at 1628-29.

As with the previous issue, the circuit courts of appeal are divided over the appropriate standard of care of the vessel owner. In *Derr,* the Third Circuit followed the *Scindia* court's pronouncement that the shipowner has no duty of supervision or inspection with respect to hazardous conditions that arise within the confinds of any cargo operations. *Derr,* 835 F.2d at 493 (citing *Scindia,* 451, 101 S.Ct. at 1624.) This Court did not limit its ruling solely to loading operations.

The *Derr* court posited the following standard of care:

> Because the ship has no duty to inspect cargo stowage operations, the ship can be held liable for failure to warn of improper stowage, if at all, when the ship has both *actual knowledge* and the danger was *not open and obvious.* The district court in *Derr* found undisputed evidence that the danger was apparent to both the vessel and the stevedore, and that there was no warning that the ship could have given that would have added to the knowledge of a competent stevedore. Indeed, appellant conceded in his brief that even the lack of dunnage and storage, alleged to be an underlying cause of the accident, "was a condition that could have been discovered by a reasonable inspection of the hold."... Consequently, as a matter of law, there was insufficient evidence upon which a jury could find liability.

Id. at 496 (emphasis added)(footnote and citations omitted). The actual knowledge standard is appropriate, since that is the same standard required before a vessel owner should intervene in cargo operations at the loading port, pursuant to the third *Scindia* duty. The Third Circuit also expressly rejected plaintiff's contention that the customary observation of loading and discharging of cargo by vessel personnel imposes a duty of supervision over such cargo operations, stating:

> Even if it were true that a vessel customarily observes the loading of cargo, understandable in light of its potential liability for certain damage to cargo...we agree with the district court that such observation cannot be used to reimpose the general duty to supervise the stevedore. Nor can

> such observation be vaulted into the type of avtive involvement and control that would trigger the ship's liability.

Id. at 494 (citations omitted).

The Fifth Circuit, prior to the *Woods* decision, was factually consistent with *Derr.* In *Lemon,* a longshoreman was injured while unloading rolls of burlap and bales of jute from the vessel because the rolls had been loaded in the hold so that gaps were created between the rolls, the sweat battens, and the skin of the ship. He sustained injury when one of the sweat battens broke away causing the bales to fall on him.

The Fifth Circuit specifically noted that the chief mate of the vessel had *actual knowledge* of the improper loading technique and failed to take action either to correct the stowage at the loading port or to warn the plaintiff or his co-workers of the dangerous condition *he knew* existed within the stow. *Lemon,* 656 F.2d at 116. Thus, the vessel owner was liable because it had actual knowledge of the nonobvious defect.

In *Harris,* the evidence established that before the accident, the shipowner *knew* the cargo was improperly stowed, and actively contributed to the defect, by failing to order dunnage. There was no evidence that an independent stevedore loaded the cargo which the Fifth Circuit felt could exonerate the vessel owner. *Harris,* 730 F.2d at 299 n.2.

Thus, *Lemon* and *Harris* stand for the proposition that a vessel owner is liable for negligent stowage of cargo if it has actual knowledge of the defect. Yet, in *Woods*, the Fifth Circuit applied the turnover duty to negligently stowed cargo. There a foreign stevedore stowed two cargoes of pipe, one bound for New Orleans, the other bound for Houston. That stevedore improperly loaded the cargo such that the Houston pipe overlapped the New Orleans pipe in several places within the hold, a condition the vessel owners knew existed. Woods, a discharging longshoreman in New Orleans, was injured when a pipe jammed in the Houston cargo causing the pipe to swing around in the hold.

Although the vessel owner knew of the overlapping condition, it contended it lacked actual knowledge of the danger and should not be liable under the first *Scindia* duty. The Fifth Circuit disagreed:

> Under the first *Scindia* duty, there is no requirement the vessel owner have actual knowledge of the danger presented before liability will attach. Rather, that duty speaks only in terms of a failure to exercise due care (although we measure its duty with regard to, not the ordinary stevedore, but the "expert and experienced" stevedore exercising "reasonable care". The law of negligence has never required that a tortfeasor actually be aware of the risks which its actions create before it may be liable, and *Scindia* does not add such a requirement in this context. *See Harris,* 730 F.2d at 299 (defendants may be

> liable under the first duty [in] situations where the [defendants] *knew or should have known* of the dangerous condition).

Woods, 873 F.2d at 851-52 (original emphasis).

Although the *Woods* court correctly states the turnover duty as regards a condition of the vessel and equipment, the court errs in two respects. The Fifth Circuit contends the actual knowledge standard does not govern actions the vessel owner creates. This position assumes the vessel created the negligent stowage, which was inconsistent on those facts and in contravention of the *Scindia* court's pronouncement of no requirement of supervision or inspection by vessel owners of cargo operations.

Secondly, the Fifth Circuit reasons *Scindia* does not add "the requirement [of actual knowledge] in this context." However, *Scindia* did not address negligent stowage of cargo by an independent stevedore, but only the defective condition of a vessel's winch used in discharge operations.

The Ninth Circuit also holds a vessel owner liable for negligent stowage, but on different grounds. In *Riggs*, the Ninth Circuit reaffirmed the vessel owner's duty as a policy choice on who among the vessel, the discharging stevedore, or the longshoreman, could best control and bear the risk of loss for injuries resulting from improperly stowed cargo. *Id.* at *3 (citing *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294 (1982)). The Ninth Circuit concluded the vessel should, since it could choose its loading stevedores, supervise their work when necessary, and can correct or warn others of the

dangers of the cargo. *Id.* at *4.

The rationale of the Ninth Circuit is flawed on all three points. First, the Ninth Circuit concluded without support that the vessel owner chooses who loads the ship. In fact, in this case, like many others, it was the charterer [ENSIDESA], not the owner, who chose the loading stevedore. Second, the Ninth Circuit contends the vessel can supervise the work when necessary. In effect, the Ninth Circuit requires the vessel to supervise, as it will be liable if it does not. This statement is in direct conflict with this Court's conclusion in *Scindia* that a vessel owner has no general duty by way of supervision of inspection concerning the work of the loading stevedore once operations commence. *Scindia*, 451 U.S. at 172, S.Ct. at 1624-25. Lastly, the Ninth Circuit concludes that the vessel owner could correct or warn of the concealed danger within the cargo. However, the vessel owner has no duty to intervene in the loading of cargo unless it has *actual knowledge* of the dangerous condition. The Ninth Circuit again is requiring vessel supervision of the loading stevedore.

In this case, the Louisiana Fourth Circuit re-defined the roles and responsibilities of the shipowner in relation to those of the stevedore. According to that court, vessel personnel become the specialists in cargo operations in addition to their duties and responsibilities with respect to the navigation and maintenance of the ship. Apparently now the stevedore, the formerly acknowledged expert in cargo operation, should defer to vessel personnel regarding these operations. *Scindia* is directly to the contrary in holding without equivocation that the determination whether to proceed with cargo operations is a matter of judgment committed to the stevedore *Scindia*, 451 U.S. at 175, 101 S.Ct.

at 1626. As stated by the Court:

> A shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.

Id. at 172, S.Ct. at 1624. The shipowner is entitled to rely on "an expert and experienced stevedore" acting with reasonable care and in general owes no duty to a longshoreman injured in the course of cargo operations. *Morris v. Compagnie Maritime de Chargeurs Reunis*, 832 F.2d 67, 71 (5th Cir. 1987), *cert. denied*, 485 U.S. 1022, 108 S.Ct. 1576, (1988).

Under the rationale of the Fifth and Ninth Circuits, the vessel owner is caught in a Catch-22: If the vessel owner does not supervise the loading of cargo, it is liable in the discharge port for negligently stowed cargo, because of what it should have known. If the vessel owner does supervise or inspect the cargo stowage in the load port, it still will be liable for injuries at the load port and discharge port, since it actively participated in the loading operations.

At the loading port, the shipowner has to intevene in the cargo operations only when it has *actual knowledge* of a defect in the ship and her equipment and *actual knowledge* the loading stevedore will not correct the defect, thus posing a hazard to *its* longshoremen. Actual knowledge is an objective standard which the loading longshoreman must prove, among others, in order to recover against the vessel. The court of appeal has con-

cluded ARCASA was liable for failing to exercise reasonable care to provide safe cargo (yet ENSIDESA supplied and loaded this cargo), apparently part of a safe ship and equipment, for the work of the stevedore at the discharge port. Reasonable care is a *subjective* standard of care, which examines what the vessel owner should have known. It is inconsistent to hold the shipowner responsible for what it *should have known* concerning allegedly negligent loading/stowage causing injury during the cargo discharging operations when it is responsible for injury during loading operations only upon *actual knowledge* that the cargo loading operations were unsafe. ARCASA suggests the appropriate standard of care of vessel liability in cases of negligently stowed cargo should be the actual knowledge standard enunciated by *Derr* and logically compelled by *Scindia.*

III. ARCASA OWED NO DUTY TO CORRECT THE CARGO STOWAGE BY ENSIDESA NOR WARN COOPER LONGSHOREMEN OF THE OPEN AND OBVIOUS CONDITION OF THE CARGO.

As set forth above, a corollary to the turnover duty is the shipowner's duty to warn the stevedore only of *hidden* dangers of which the shipowner is aware or should, by the exercise of reasonable care, be aware. *Scindia*, 451 U.S. at 167, 101 S.Ct. at 1622; *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1036 (5th Cir. 1983). There obviously cannot arise a duty to warn of *hidden* dangers if there was no danger, *hidden* or otherwise, known to the shipowner. Yet, the court of appeal remarkably concluded the open and obvious condition of the cargo in the lower holds was no defense to ARCASA's alleged negligent failure to warn. This is clearly an error of law.

The testimony of the longshoremen and Cooper supervisory personnel established that the condition of the cargo and dunnage was open and obvious for anyone to see. There were no "hidden" dangers. Any alleged duty to warn the longshoremen "is not breached if the defect causing the injury was open and obvious and one that the longshoremen should have seen. An obvious defect should be as apparent to the stevedore and its longshoremen employees as to the shipowner." *Pollizi v. M/V ZEPHYROS II MONROVIA*, 860 F.2d 147, 149 (5th Cir. 1988).

In *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984), the Ninth Circuit observed that the damaged condition of the cargo in that case, torn sacks of beans, was obvious to the stevedore when the vessel's hatches were opened. Thus, the court concluded there was no duty on the part of the vessel owner to warn of obvious dangers. *Id.* at 1387. The court further noted that the stevedore superintendent walked through the sacks and did not consider them to be hazardous; consequently, it was reasonable for the shipowner to expect the stevedore to take appropriate steps to maintain a safe work place. *Id.* at 1388. Thus, although the alleged dangerous condition existed *prior* to the commencement of cargo operations, the court found the shipowner could not be held liable to the plaintiff longshoreman.

District courts within the Fifth Circuit have critized *Lemon* as it conflicts with *Scindia*, concerning the absence of a duty to correct or warn of an open and obvious condition. In *McCullough v. S.S. Coppename*, 1983 A.M.C. 2547 (E.D. La. 1982), the district court stated, after noting that several Fifth Circuit opinions had recognized the continu-

ing vitality of the "open and obvious" doctrine:

> Interestingly, the *Lemon* court then quoted verbatim the *Scindia* standard concerning the shipowner's duty "to at least warn the stevedore of *hidden* dangers which would have been known to him in the exercise of reasonable care."...and incongruously applied it in place of established Fifth Circuit doctrine to a fact situation in which the danger was clearly known to the injured longshoreman. ...The cited passage from *Scindia*, however, refers only to hidden dangers, and the *Lemon* court's interpretation of that passage overlooks earlier language in the *Scindia* opinion indicating that the shipowner's duty extends only to dangers "that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work." *Scindia Steam Navigation Co. v. De los Santos, supra*, 451 U.S. at 167, 1981 A.M.C. at 609.
>
> In my view, the *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243 (5th Cir. 1982)] decision is a more accurate interpretation of the meaning of *Scindia* than the *Lemon* decision . *Lemon* applies *Scindia* to a fact situation with which *Scindia* was not directly concerned; *Pluyer* recognizes the implicit limitations of the *Scindia* ruling.

Id. at 2552. The court granted summary judgment in favor of the vessel owner, holding that the vessel owner owed no duty to warn of the open and obvious dangers of inadequate lighting, the presence of cracked boards and broken pallets, and of a partially uncovered hatch opening.

In *Spence v. Mariehamns R/S,* 766 F.2d 1504 (11th Cir. 1985), the Eleventh Circuit noted that the manner of stowage, although it posed a hazard to the longshoremen, did not affect the ability of the stevedore to discharge the cargo with reasonable safety. The court further noted that the shipowner's duty to warn of *unknown* dangers was not triggered as the hazards were known to the stevedore and longshoremen.

In *Bonds v. Mortensen and Lang,* 717 F.2d 123, 127-28 (4th Cir. 1983), the Fourth Circuit stated:

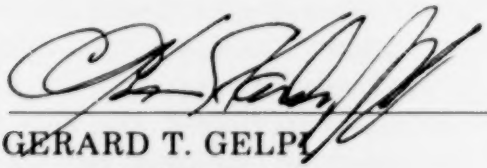
> However, the malfunctioning bell and ship's design being obvious and known to all, the shipowner was entitled to rely on Ryan-Walsh's judgment as to whether discharge operations could safely be undertaken. Ryan-Walsh obviously concluded that these conditions did not pose an unreasonable risk of harm, for the longshoremen proceeded to unload the ship's cargo without complaint or incident until the time of the accident.

That reasoning, which applied to *ship's equipment,* applies with greater force here as the alleged defect involved only the *cargo*. Accordingly, there simply was no breach by ARCASA of any alleged duty owed to the longshoremen prior to the commencement of cargo operations.

CONCLUSION

There is a clear split in the circuits, concerning the duty of a ship owner to a longshoreman employed by the discharging stevedore when the longshoreman has been injured by the negligent stowage of cargo by an independent loading stevedore. This split has been previously acknowledged by three members of this Court. Considering this Court's constitutional mandate to ensure uniformity of the admiralty law of the United States, which it has zealously performed, ARCASA respectfully requests this Court grant this petition for writ of *certiorari* to clarify the duties, if any, of a vessel owner in this context.

Respectfully submitted,



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